

Finding

To: Record

From: Ken Decker, City Manager

CC: Distribution

Date: February 18, 2021

Re: Continuation of a nonconforming use at 508 South Kettle Street, Altoona, PA

Question: Is the proposed use of an office and incidental storage for a plumbing contracting business at 508 South Kettle Street permissible under the 2012 special exception granted by the Altoona Zoning Hearings Board?

Response: In 2012, the current property owner of 508 S. Kettle Street, Contessa Riley, sought a special exception from the Altoona Zoning Hearings Board. The Findings of Fact in that matter are attached hereto. Based on testimony presented at the June 13, 2012 hearing, the Board granted the special exception to "create a furniture and boutique business in a nonconforming building with a Single Household Residential Zone."

Subsequent to the approval, the property owner has operated the proposed furniture and boutique business until recently and now seeks to sell the property. Randy Beers, the owner of a local plumbing company, now seeks to purchase the property for use as a "home base" for his business.

The ZHB decision carefully lays out the facts related to the property. Of note, the property has been used historically for commercial purposes (previously a trophy store, dance studio, etc.) According to the decision, the building was "obviously built and designed for such a Commercial and Non-Residential Use." The decision further states that there is a "demonstrated history of the building having been used for Commercial, Retail, Office, or Industrial purposes."

The decision notes that the “exterior features” demonstrate that the structure “was obviously designed and built for a Commercial Retail Office or Industrial Use” and adds that “Converting the subject building into a permitted use or activity would be at great cost, either excessive and/or prohibitive to the owner and beyond reasonable expectation.” Those facts appear unchanged from 2012.

The property is located in the “R-SH, Single-Household Residential” zoning district. The property is immediately adjacent to an “M-RC” zoning district, “Mixed Use, Residential Commercial.” The surrounding neighborhood currently includes a bar, hair salon, insurance agent and an office equipment supplier.

Nonconforming uses in the City of Altoona are governed by § 800, Article III of the City Code. As noted in the decision, the myriad uses of the property over time have not conformed with the restrictive provisions of the “R-SH” zoning district.

As recognized by Commonwealth courts, nonconforming uses invoke certain Constitutional protections. The City Code recognizes that a “lawfully existing nonconforming building” may continue to exist. Specifically:

“The legitimate interests of those who established these nonconformities are recognized in this chapter by permitting such nonconformities to continue, subject to regulations for and limitations upon their completion, restoration, reconstruction, extension, and substitution. It is recognized, however, that nonconformities substantially and adversely affect the orderly development, maintenance, use, and taxable value of other property in the district — property that is itself subject to the regulations of this chapter.”

The City Code also is restrictive regarding changes in a nonconforming use. From § 800-21.E:

Change of nonconforming use. *A nonconforming use all or partially conducted in a nonconforming structure or structures may be changed to another nonconforming use only upon determination by the Zoning Hearing Board, after public hearing, that the proposed new use will be more conforming to its neighborhood and surroundings than the use it is to replace. With the application, the applicant shall submit a brief report. This report shall take into consideration such factors, among others, as traffic generated; nuisance characteristics, such as emission of noise, dust, odors, and smoke, creation of vibrations and fire hazards; the hours and manner of operation.*

Before proceeding, it is important to discuss “use.” The term is defined in § 800-6 as:

“The specific purpose for which land or a building is designed, arranged, intended or for which it is or may be occupied or maintained. The term “permitted use” or its equivalent shall not be deemed to include any nonconforming use.”

In this instance—and as affirmed by the ZHB decision—the land and building were designed and occupied for commercial use. It is simply that the commercial uses for which it was designed do not conform to the zoning district.

Also instructive to the question at hand is the significant list of conditions imposed by the 2012 decision. Specifically:

- The hours of operation will be 10 a.m. to 8 p.m., Monday through Saturday with no open hours on Sunday;
- The noise and odor level, if any, would be at a minimum;
- The number of employees working onsite would be no more than four;
- The building shall not be expanded more than 20 percent without additional and separate approval from the ZHB;
- No exterior loudspeakers or other systems which can be heard beyond the property line will ever be used in and about the premises;
- Lighting shall be required and all lighting will be self-contained within the parking lot but not interfere with adjacent residential uses;
- Any deliveries to and from the property shall be made from the parking lot and not the alley;
- All signage will not exceed the current signage which exists on the property.

Finding 1:

It is common for contractors and professionals in the building trades to have a home office. The work of such professionals occurs almost entirely on job sites throughout a community. A home office is generally used for routine administrative tasks like bookkeeping, payroll, etc. Other than a vehicle with a company logo parked in a driveway, these home offices often are indistinguishable from surrounding houses. Based on what has been informally presented by the potential buyer of the property, the initial proposed use would be largely similar to such a home office and would not exceed the current use of the property.

Under Article III, the requirement for a ZHB hearing and determination is triggered by a change of use to another *nonconforming* use. One can argue that the initial use as a home office for an off-site business generally conforms with the intent of zoning district.

Finding 2:

Even if the initial continuation of a commercial use of the property is as a “home office” for a plumbing business, it is reasonable to anticipate growth. Considering the ZHB’s 2012 decision should “used furniture” or “boutique store” be read as definitive or as generally descriptive of “business”?

To explain, consider if the property owner decided to sell new furniture. Would this necessitate another ZHB hearing? "Furniture" and "boutique" are not defined in Zoning Ordinance. The common definition of "boutique" is "a small store selling fashionable clothes or accessories." Would it be a violation of the ZHB decision to sell unfashionable items?

Reading change of use language too narrowly would force lawful businesses to routinely seek ZHB approvals every time the scope of the business changed. A restrictive interpretation of use also would force the City to engage in frequent and subjective zoning enforcement. A more pragmatic interpretation of the Board's decision is that there was an intent for "use" to be read broadly, particularly in light of the very specific conditions imposed.

It is my finding that the Board's decision allows for a wider range of commercial activity than only the sale of used furniture and fashionable apparel and that could reasonably include the "home base" of a plumbing contractor. It is my further finding that any such use must still comply with all the conditions previously imposed by the Board as outlined above.

Appeal

Pursuant to § 640-49, "Any aggrieved applicant may appeal the decision of the Planning Administrator to the Altoona City Planning Commission. Such appeal shall be filed with the Commission within 30 days of the Planning Administrator's written decision. The Planning Commission shall have 60 days from such filing to render a decision." For purposes of appeal the date of this decision is February 17, 2021.

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